PD-1184-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 2/17/2017 10:48:49 AM
Accepted 2/21/2017 2:12:45 PM
ABEL ACOSTA
CLERK

No. PD-1184-16

FILED
COURT OF CRIMINAL APPEALS
2/21/2017
ABEL ACOSTA, CLERK

In the
Texas Court of Criminal Appeals
At Austin

No. 01-15-00132-CR
In the Court of Appeals for the First District of Texas at Houston

RICHARD CHARLES OWINGS, JR.
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT PERMITTED

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

Victim:

K.M. — a child victim of sexual assault under the age of 14[1]

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Trial Judge:

Honorable Denise Bradley, Presiding Judge

[1] The pseudonym Jane will be used to protect the identity of the victim.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT REGARDING ORAL ARGUMENT

This Court has not permitted oral argument in this case.

STATEMENT OF THE CASE

The appellant was charged by indictment with the felony offense of the aggravated sexual assault of a child. (CR—10). The jury found the appellant guilty as charged in the indictment. (CR—193, 200; 5 RR 89-91). The jury assessed punishment at 30 years confinement in the Institutional Division of the Texas Department of Criminal Justice. (CR—199, 200-201; 4 RR 48-49).

On August 30, 2016, a panel of the First Court of Appeals issued a published opinion reversing the conviction, finding the trial court's error in failing to require the State to elect which specific instance of sexual abuse it relied upon constituted harmful constitutional error. *See Owings v. State*, No. 01-15-00132-CR, 2016 WL 4536449 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, pet. granted) (not yet released for publication). The opinion was authored by Justice Keyes, and joined by Justice Jennings. *Id.* Justice Bland filed a dissenting opinion. *Id.* This Court granted review on whether the appellant was harmed by the trial court's error.

ISSUE PRESENTED

Whether the trial court's failure to require an election by the State should have resulted in a reversal when the testimony regarding multiple incidents of abuse was admissible, the descriptions of each incident were essentially the same, the jury was charged on only one offense, and the appellant's defense was the same across the board?

STATEMENT OF FACTS

Jane was routinely sexually assaulted by the appellant, her step-grandfather, between the ages of five and eight years old (3 RR 20-23). Jane was close with the appellant and was frequently left in his care while her mother and grandmother were at work or during family gatherings (3 RR 21-32, 94-95, 102-3).

Jane was eleven years old at the time of trial (4 RR 8). She recalled several instances of abuse by the appellant (4 RR 22-54). Jane testified that the appellant did the same thing each time (4 RR 47). Jane described that the appellant would put her in the closet and take off her clothes; the appellant would be undressed as well (4 RR 22). She described that the appellant would put her on the bed in the bedroom, get on top of her, and threaten her with his knife (4 RR 22-25). She stated that he then would stick his penis in her vagina and it hurt (4 RR 22-24, 27-28). Jane said that she saw something come out of his private part and he would attempt to hide it with clothes (4 RR 29). Afterward, she explained that she

would get dressed in the closet (4 RR 29-30). Jane testified that the appellant always locked the door (4 RR 30).

Jane stated that this happened a lot and it upset her (3 RR 214; 4 RR 22-23, 47). The first incident Jane described occurred in her grandmother's room when she was around five years old (4 RR 22-23). She explained that the appellant did the "same thing" another time in her grandmother's room, but that time he also forced his penis into her mouth, which tasted disgusting (4 RR 32-35). Jane described "both things" happened again but in her uncle's room and at the appellant's father's home (4 RR 36-43, 46-7). Jane testified that he would not do anything different on each occasion; she stated it was all the same (4 RR 47).

Jane's mother and grandmother supported her testimony. They testified that looking back they were suspicious of the appellant's favoritism of Jane over the other grandchildren (3 RR 32-35, 48). Both women testified that they found Jane behind a locked door with the appellant on several occasions and when the door would open Jane would be dressing or wearing her grandmother's lingerie (3 RR 35, 38, 43, 104-6). Jane's grandmother and the appellant divorced in 2011 (3 RR 46-47). Two years later, Jane disclosed to her grandmother that the appellant had sexually abused her (4 RR 51-52).

The appellant denied committing the offenses (5 RR 32-34). He testified that there was no reason for Jane to make this up, but that he believed Jane's

grandmother convinced her it happened and that Jane enjoyed receiving attention (5 RR 38-39). The jury found the appellant guilty (5 RR 89-90).

SUMMARY OF THE ARGUMENT

The appellant claimed that he was harmed from the trial court's failure to require an election by the State. The court of appeals held that he was harmed because the jury ran the risk of not being unanimous in its verdict and the appellant did not have notice of which act the State would rely upon to present his defense. That decision should be overruled. Article 38.37 expressly permits evidence of multiple incidents of abuse and the appellant received notice of the acts the State admitted prior to trial. The descriptions of each incident were essentially the same and evidence supported an offense occurring close to the charged date of January 1, 2010.

Regardless, the appellant's defense was the same across the board to each act, a complete denial. Furthermore, jurors received a limiting instruction as to extraneous evidence during trial and in the charge as well as a jury instruction that they must unanimously find the charged offense. Between the unanimity instruction and limiting instruction, the proceedings protected appellant's interest in a unanimous verdict. Thus, the record establishes beyond a reasonable doubt that the error in this case did not contribute to the appellant's conviction.

ARGUMENT

The appellant was charged with one act of aggravated sexual assault of a child by causing his sexual organ to contact the sexual organ of Jane, a child under the age of 14, on or about January 1, 2010 (CR—10). Evidence at trial revealed a continuing course of sexual contact between the appellant and Jane, beginning when Jane was five years old and continuing until sometime in 2011 when Jane was eight.

At the close of the State's evidence, the appellant requested that the trial court order the State to elect which act they were proceeding on for conviction (5 RR 5). The trial court appeared to find that the indictment, which alleged only one act on or about a certain date, January 1, 2010, was sufficient. *See* (5 RR 5-6). The appellant argued:

> We have had multiple offenses given to us in testimony, and we have multiple dates for occasions for them, and we believe that under *Milby v. State*, the State having rested, we have the right to ask the State to elect which one of the multiple occasions it's going to rely on.

(5 RR 5). The trial court responded:

> And just so that I'm clear, I have a copy of the indictment in front of me, which we all, obviously, had an opportunity to review it. There is one allegation alleged in the indictment. There is one date that is alleged in the indictment. So, the State is relying on the elements, I would imagine – well, they are required by law to rely on what they have pled, which is one act on or about a certain date. There aren't multiple paragraphs in this indictment alleging different acts on different dates.

(5 RR 5). The trial court further explained she would be providing a limiting instruction in the court's charge regarding the other acts presented (5 RR 6). The appellant moved on to a separate complaint.[2]

The trial court's failure to require an election by the State should not have resulted in a reversal. The error was harmless beyond a reasonable doubt. *See Phillips v. State*, 193 S.W.3d 904, 909 (Tex. Crim. App. 2006) (concluding trial court's error in failing to require the State to elect when requested by appellant was reviewed for constitutional harm); TEX. R. APP. P. 44.2(a) (a reviewing court must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment).

A harm analysis for the failure to require an election considers the reasons for the rule. *See Phillips*, 193 S.W.3d at 909; *Owings*, 2016 WL 4536449 at *9-10; *Owings v. State*, 01-15-00132-CR, 2016 WL 4536449, at *14 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, pet. granted) (not yet released for publication) (Bland, J. dissenting). An election serves four purposes: (1) it protects the accused from the introduction of extraneous offenses; (2) it minimizes the risk that the jury might choose to convict, not because any one crime was proved beyond a reasonable doubt, but because all of the incidents convinced the jury that the defendant was

[2] The State's ground for review on whether the appellant preserved error was not granted.

guilty; (3) it ensures jury unanimity, that is, unanimous agreement that one specific incident occurred constituting the offense charged; and (4) it gives the defendant notice of the specific offense for which he is on trial and affords him an opportunity to defend. *Phillips*, 193 S.W.3d at 909; *see also Dixon*, 201 S.W.3d at 733 (noting courts consider the four purposes underlying election requirement, as articulated in *Phillips*).

First, as both the majority and Justice Bland observed, the appellant was not entitled to be protected from the admission of evidence of extraneous sexual offenses committed by him against Jane due to Article 38.37. *Owings*, 2016 WL 4536449 at *10, *14. Article 38.37 of the Texas Code of Criminal Procedure permits the admission of evidence of extraneous offenses to show the previous and subsequent relationship between the appellant and the child victim. TEX. CODE CRIM. PROC. ANN. art. 38.37 (West Supp. 2014). Understanding that children have difficulty separating events, remembering events in chronological order or providing dates of events, courts have recognized that Article 38.37 permits the admission of any and all acts between the defendant and the child to help explain an act that would otherwise seem implausible to the average juror. *Dixon*, 201 S.W.3d at 735-37; *Poole v. State*, 974 S.W.2d 892, 898 (Tex. App.—Austin 1998, pet. ref'd). Thus, the trial court's error did not cause harm as to the first purpose of the election requirement.

The second purpose, the risk that the jury found the appellant guilty by adding up all of the offenses, and the third purpose, the risk that the jury failed to return a unanimous verdict as to one offense, were likewise not frustrated. Here, all the assaultive incidents did not involve different witnesses describing various activities that the jury might perceive as warranting a finding of guilt even though no single offense was proved beyond a reasonable doubt. Instead, all of the assaultive incidents were recounted by only Jane. *See Dixon*, 201 S.W.3d at 735-37.

Although Jane testified about incidents occurring in different locations, the sequence of events and the acts themselves were all essentially the same. During each act, the appellant undressed himself and Jane, placed Jane on a bed, and forced his penis into her vagina (4 RR 18-46). And Jane described that on several occasions the appellant additionally forced his penis into her mouth afterward (4 RR 32, 36, 46). When beginning testimony of other incidents, Jane used phrases like the "same thing that he did the first time," he did "both things," or "it happened." (4 RR 32, 36, 45-6). Therefore, although Jane provided a little more detail than stating the same thing happened "x" number times, the identical descriptions of each incident were in essence the same. *Cf. Dixon*, 201 S.W.3d at 735 (finding child's account of one sequence of events and that it happened a hundred times did not frustrate the second purpose of an election); *see also Reza v. State*, 339 S.W.3d 706, 716 (Tex. App.—Fort Worth 2011, pet. ref'd) (finding no harm under

second purpose when complainant's description of continuing sexual abuse was general and nonspecific though the child testified that the appellant touched, described different locations, described that sometimes he used cream and did not give specific dates); *but see Phillips*, 130 S.W.3d at 354 (finding error not harmless when multiple offenses described in detail).

The jury either found Jane credible or not. As this Court noted in *Dixon*, "[w]hether the sequence of events was alleged to have occurred one, ten, fifty, or one hundred times does not by itself impact the believability of the child's story." *Dixon*, 201 S.W.3d at 735; *see also Reza*, 339 S.W.3d at 716 (finding when victim's testimony involves a continuing course of the same general, indistinguishable type of conduct over a period of time, the issue is typically whether the jury believes the complainant generally or not at all). The additional unindicted act of oral sex described in the latter three incidents and the different locations the abuse occurred did not make Jane's testimony any more or less credible. *See Smith v. State*, 2-08-394-CR, 2010 WL 3377797, at *13 (Tex. App.—Fort Worth Aug. 27, 2010, no pet.) (not designated for publication) (finding no risk the jury believed the victim about one incident as opposed to the other when only distinguishing detail was whether offenses occurred in the victim's bedroom or the appellant's) (citing *Dixon*, 201 S.W.3d at 735).

Additionally, the jury was properly instructed that it was required to "unanimously" find the appellant guilty as to the single indicted incident of aggravated sexual assault of a child and instructed the jury not to consider evidence about uncharged incidents of sexual abuse in determining guilt (CR—186-87, 189). The application paragraph of the charge instructed the jury:

> Now, - if you unanimously find from the evidence beyond a reasonable doubt that on or about the 1st day of January, 2010, in Harris County, Texas, the defendant, Richard Charles Owings, Jr., did then and there unlawfully, intentionally or knowingly cause the sexual organ of Kati Mercer, a person younger than fourteen years of age and not the spouse of the defendant, to contact the sexual organ of Richard Charles Owings, Jr., then you will find the defendant guilty of aggravated sexual assault of a child, as charged in the indictment.

(CR—186). And the jury was properly instructed that it must believe any extraneous offense happened beyond a reasonable doubt. The limiting instruction stated:

> You are further instructed that if there is any evidence before you in this case regarding the defendant other crimes, wrongs, or acts against the child who is the victim of the alleged offense in the indictment in this case, you cannot consider such evidence for any purpose unless you find and believe *beyond a reasonable doubt* that the defendant committed such other crimes, wrongs, or acts against the child, if any, and even then you may only consider the same in determining its bearing on relevant matters, including: (1) the state of mind of the defendant and the child; and (2) the previous and subsequent relationship between the defendant and the child, and for no other purpose.

(CR—189) (emphasis added). The jurors were further instructed to certify their verdict only after they "unanimously agreed upon a verdict" (CR—191-92). Reading these instructions together, the jury could have unanimously decided the appellant was guilty of one of the instances of sexual assault.

The majority discusses only the unanimity instruction included in the application paragraph and discounts the instruction as "boilerplate," citing *Cosio v. State*, 353 S.W.3d 766 (Tex. Crim. App. 2011). But, the "boilerplate instruction" in *Cosio* referred to the instruction at the end of the charge that certified jurors had unanimously agreed upon a verdict; the *Cosio* charge did not include a unanimity instruction in the application paragraph. *See Cosio*, 353 S.W.3d at 773-74. Whereas, as Justice Bland noted in her dissent, the unanimity instruction in this case was included in the application paragraph and pointed jurors to one specific offense. *See Owings*, 2016 WL 4536449, at *14 (Bland, J. dissenting). Regardless, in *Cosio*, this Court held that despite the failure to include a more explicit unanimity instruction the error was harmless. *See Cosio*, 353 S.W.3d at 77-78; *see also Demps v. State*, 278 S.W.3d 62, 69 (Tex. App.—Amarillo 2009, pet. ref'd) (holding trial court's failure to include a further instruction requiring unanimity as to one incident did not contribute to conviction, especially in light of general instruction requiring unanimity).

The evidence was strongly in favor of conviction. Jane testified in detail about the first offense she could remember in her grandmother's bedroom, how the appellant undressed her, put her on his bed, threatened her with a knife, and forced himself inside of her (4 RR 18-29). She testified that this happened a lot and described it happening in three other locations (4 RR 32-46). As previously stated, Jane's testimony about each incident was essentially identical, with the appellant always undressing her, placing her on the bed, and putting his penis in her vagina. She described how it felt and how the appellant's private part appeared long (4 RR 18-46).

Jane's mother and grandmother testified that they found Jane and the appellant in suspicious circumstances on several occasions, behind a locked door and Jane in lingerie (3 RR 33-43, 104-6). And Jane's testimony was consistent with the information she provided Holcomb in her forensic interview and Valdes in her sexual assault exam (3 RR 170-71, 212-24). The appellant admitted that there was no reason for Jane to lie and admitted to Jane wearing his wife's "nighty" behind locked doors with him (5 RR 38, 46-49). The appellant's defense was the same across the board – that he did not commit any of the offenses (5 RR 31-34).

Furthermore, the parties' closing arguments did not incorrectly inform the jurors that they did not have to be unanimous as to one act. *Compare Cosio*, 353 S.W.3d at 777-78 (noting neither the parties nor the trial court added to charge

error by telling jury it did not have to be unanimous and, therefore, this factor did not weigh in favor of finding harm), *with Gomez v. State*, 01-15-00179-CR, 2016 WL 3742903, at *6 (Tex. App.—Houston [1st Dist.] July 12, 2016, no. pet.) (not yet published) (finding harm when State incorrectly argued that jury could "mix and match" offenses), *and Ngo v. State*, 175 S.W.3d 738, 750-52 (Tex. Crim. App. 2005) (finding harm when prosecutor and judge both misstated law concerning unanimity on multiple occasions). Instead, the prosecutor only mentioned details from the first incident Jane described from the end of 2009 in her argument (5 RR 74, 78).

Based on the entirety of the record and the instructions, it is logical to presume that the jury unanimously agreed that the appellant committed *all* of the separate instances of criminal conduct during each of the alleged incidents and not that the State failed to prove any particular offense or that jurors split their votes. *See Cosio*, 353 S.W.3d at 777-78 (finding no harm despite charge failing to instruct the jury to be unanimous to one act when jury was likely unanimous to all acts); *Smith*, 2010 WL 3377797 at *13 (holding no harm for failure to require an election on some charged offenses when victim testified about same type of "nonspecific, indistinguishable conduct" over a long time period); *see also Dixon*, 201 S.W.3d at 735 (noting Dixon was fortunate jury could only convict him of one act and State's failure to elect jeopardy-barred it from prosecuting remaining offenses individually

or as a continuous). Therefore, considering the second and third purposes of an election, the appellant was not harmed.

Fourth, the appellant was not deprived of adequate notice in order to prepare a defense. The appellant's defense was the same character and strength across the board for all acts alleged. The appellant denied committing *any* of the alleged acts and asserted that he believed Jane succumbed to pressure from her grandmother constantly questioning if something had happened to her; the appellant posited that Jane liked the attention due to her unstable home life (5 RR 19-20, 22, 31-34). As Justice Bland noted in her dissent, the appellant's defense would have been the same regardless of the act that the State elected to pursue. *Owings*, 2016 WL 4536449, at *14 (Bland, J. dissenting). No evidence was presented that the appellant had a different defense to one or more of the offenses; instead, the appellant admitted to being alone with Jane in those locations and that Jane wore a "nighty" with him behind locked doors but denied assaulting her (5 RR 31-34, 49). *See Reza*, 339 S.W.3d at 717 (finding no harm under fourth consideration; noting that the appellant never indicated defense was adversely affected about not receiving State's election prior to presenting his case); *see also Taylor v. State*, 332 S.W.3d 483, 493 (Tex. Crim. App. 2011) ("The defensive theory was that no sexual abuse occurred at any time … the jury either believed [a]ppellant or believed the victim.").

The appellant was aware of the charges and allegations against him. *See Phillips*, 193 S.W.3d at 912 (noting the purpose of election is the defense "must be made aware of the exact crime he is defending against"). Prior to trial, the State filed a notice of its intention to use Jane's hearsay statements which included summaries of those statements and the State filed a notice of its intention to introduce extraneous offenses (CR—60-61, 90, 168-69).[3] Additionally, the

[3] The State's notice included summaries of three possible outcry witnesses. They stated the following:

"Summary of Fae Morris (Grandma):
On or about January 25, 2013, [Jane] disclosed that Defendant would take [Jane] in the bedroom, make her take off her clothes then make [Jane] put her mouth on Defendant's "private spot" (penis). [Jane] further disclosed that Defendant would touch her." (CR—60-61).

"Summary of Nurse Sarah Valdes:
On or about June 7, 2013 was taken to UT Health (CARE Clinic/Center) for medical treatment purposed and during that exam disclosed that "My Grandpa" (Defendant) touched her "in a lot of places" with "his hands. She states he touched her vagina and bottom with his private part (penis). She states he also put his private part (penis) in her mouth "once". She states that something did come out of his private part. She states that the acts were committed "throughout the years-it's been a long time" and it hurt. She denies he hit her "but he always threatened me"." (CR—60-61).

"Summary of Forensic Interview with Lisa Holcomb:
On or about February 5, 2013 a Forensic Interview was conducted with [Jane] Mercer by Forensic Interviewer Lisa Holcomb. [Jane] demonstrated that she understood the difference between the truth and a lie. [Jane] states she is at the CAC because her "paw paw' (Defendant) did a horrible thing to me" [Jane] disclosed that between the ages of four and eight the Defendant would tell her to take off her clothes. She described she would take her clothes off and he would get on top of her and he would "go up and down" on her front "private area" (vagina). She described his "private area" (penis) as being hard. She further disclosed that the Defendant would touch her everywhere (by gesturing to her breast area and genitals). [Jane] described a time when she was watching TV in her Uncle's room. She described Defendant came in the room with his knife and placed the knife on the desk. He took her clothes off and his clothes off too. She described he went up and down on her body then he put his hand on her head and made her put her mouth on his "private area" (penis). She states Defendant made her put her mouth on his "private area" (penis) on more than one occasion. [Jane] states that "stuff' would come out (of his penis) and it would be on the bed." (CR—60-61).

appellant appeared to have access to a copy of Jane's forensic interview, in which she similarly described each incident. *See* (CR—55-56; 4 RR 52, 113).

And, as Justice Bland noted in her dissent, the trial court pointed the appellant to the single act charged in the indictment. *Owings*, 2016 WL 4536449 at *14 (Bland, J. dissenting). The appellant appears satisfied with this clarification because he does not further pursue his request at that time, at the close of all evidence, or during the charge conference (5 RR 5-6, 62-63). The trial court provided a limiting instruction when requested by the appellant during trial and again in the charge (CR—189; 3 RR 155-56; 5 RR 5-6)). *See Phillips*, 193 S.W.3d at 911 n. 40 (noting a limiting instruction given at the time evidence admitted could conceivably render the lack of an election harmless).

Moreover, as previously stated, Jane's testimony about the offenses committed was essentially identical. Even if the State had elected a specific offense, it is unlikely that the appellant would have chosen only to negate *that* offense, when the record does not show any distinguishing characteristics about each offense other than locations. And the appellant would have likely presented any offense-specific defense, if he had one, in order to attack Jane's credibility to all the allegations. As previously stated, the appellant's defense was a general denial and the same across the board. The appellant has not indicated that he was

adversely affected by not receiving notice of an election. *See Reza*, 339 S.W.3d at 717. Thus, the appellant's ability to prepare his defense was not affected.

Finally, it is unclear how the jury would have been instructed on an elected-offense in order to distinguish it from other acts in the jury charge. Specificity is extremely difficult when a child has had to succumb to routine acts of abuse; acts blend together and become difficult to distinguish for a child. Here, providing the January 2010 timeframe at least pointed jurors to one act described around that time – the first incident Jane described occurred close to the time she moved in with the appellant at the end of 2009 (CR—186-91; 3 RR 94; 4 RR 18-29). Adding more facts to the application of the charge, like a specific location, would not only be adding elements to what the State is required to prove but would also run the risk of still not being specific enough when multiple acts are described occurring in the same location, like "grammy's room."[4] *See, e.g., Isenhower v. State*, 261 S.W.3d 168, 174-75 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding though State made an election, the jury instructions failed to inform the jury of the State's election of the act on which it would rely for conviction with enough specificity). It also runs the risk of being a comment on the weight of the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 38.05 (West 2010); *Davis v. State*, 955 S.W.2d 340, 351

[4] There is no dispute that each incident occurred in Harris County (CR—10; 5 RR 35).

(Tex. App.—Fort Worth 1997, pet. ref'd) ("A jury instruction that comments on the weight of the evidence or that assumes a disputed fact is impermissible.").

This case provides an example of the conflict between the express admissibility of all the acts committed by the appellant against the child under Article 38.37, the lack of a need for a specific date to be proven under the "on or about" language, and the election requirement. While the appellant is entitled to an election when requested, it is unlikely in cases such as this that he is harmed by the failure to require an election based on the admission of such similar, repetitive extraneous offenses, all of which he generally denies when both limiting and unanimity instructions are given. This Court should reverse the Court of Appeals' judgment on this issue.

PRAYER

It is respectfully requested that the Court of Appeals' judgment on this issue be reversed and the case remanded to address the appellant's remaining claim on appeal.

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CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that: (a) the word count function of the computer program used to prepare this document reports that there are 4,404 words in it; and (b) a copy of the foregoing instrument will be served by efile.txcourts.gov to:

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Date: 2/17/2017